No. 92.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

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JAMES H. EASTON, PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ARGUMENT IN REPLY FOR THE PLAINTIFF IN ERROR.

H. T. REED, C. W. REED, FOR PLAINTIFF IN ERROR.

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I.

Proper construction of the Iowa Law.

The plaintiff in error contends and assigns as error,

That the supreme court of Iowa erred in holding that sections 1884-1885 of the code of Iowa (1897) do in fact apply to national banks and to the plaintiff in error as an officer of such bank.

It is contended on the part of the defendant in error that where a state statute has been construed by the highest court of such state, such construction is conclusive upon the federal courts, and that inasmuch as the supreme court of Iowa holds that sections 1884 and 1885 of the code of that state were intended to and do in fact apply to national banks, their officers and agents, that this court is concluded by such holding, and is thereby precluded from placing its own independent construction upon these sections of the Iowa code.

The rule so invoked by the defendant in error is a familiar one, but we think it is not applicable to this case. It is applicable more particularly to statutes and decisions of a local nature which establish a rule of property within the state; but in all

cases where it is necessary to determine whether or not a right secured by the constitution or some law of the United States has been violated by a state statute or municipal ordinance, the supreme court of the United States will place its own independent construction upon such state law. Such seems to be the holding of this court.

Jefferson vs. *Skelly*, 1 Black., 436; *The Hoboken Bridge*, 1 Wall., 116; *Delmas* vs. *Ins. Co.*, 14 Wall., 661; *Butz* vs. *City of Muscatine*, 8 Wall., 575; *University* vs. *Illinois*, 99 U. S., 309; *Yick Wo* vs. *Hopkins*, 118 U. S. 356; *Scott* vs. *McNeal*, 154 U. S., 34.

In *Butz* vs. *City of Muscatine*, 8 Wall., 575, it is said: "In all "cases brought here under the 25th section of the Judiciary Act "this court has never hesitated to determine for itself the con- "struction and effect of any statute of a state brought under re- "view without reference to the previous adjudications of the "highest courts of the state upon the subject. In the opinion in "the case of *Jefferson Bank* vs. *Skelly*, it was well asked, Of "what value would the appellate power of this court be to the "party aggrieved if such were not the rule? In that case, and "in all the other cases brought here involving the same question, "an act of the legislature of Ohio was pronounced invalid and "the judgments of the supreme court of the state were reversed. "* * Where the settled decisions in relation to a statute local "in its character have become rules of property these remarks "have no application; in such cases this court will, as it always "has done, follow such adjudication. The cases of a different "character, involving state statutes in which the adjudications "of the state courts in relation to them have been departed "from by this court, extend in an unbroken series from an early "period after its organization to the present time."

In *Delmas* vs. *Ins. Co.*, 14 Wall., 661, Mr. Justice Miller speaking for this court said: "This court has always jealously assert- "ed the right, when the question before it was the impairing of "an obligation of a contract by state legislation, to ascer- "tain for itself whether there was a contract to be impaired. If "it was not so, the constitutional provision could always be "evaded by the state courts giving such construction to the con- "tract, or such decision concerning its validity, as to render the "power of this court of no avail in upholding it against un- "constitutional state legislation." The other cases are to the

same effect. It is true that in some of these cases the questions involved were the validity of contracts, and whether or not they were impaired by some state statute, but the provision of the federal constitution inhibiting the states from passing any law impairing the obligations of contracts is only one of the rights secured to the citizen against the action of the state. The principle is applicable alike to any right secured to the citizen by the constitution or any law of the United States. Thus in *Yick Wo* vs. *Hopkins*, 118 U. S., 356, this court placed its own construction upon a municipal ordinance of the city of San Francisco, which was construed by the state court, and under which the plaintiff in error had been sentenced to imprisonment. Mr. Justice Matthews speaking for this court says: "That (the con-"struction of the ordinance by the state court), however, does "not preclude this court from putting upon the ordinances of the "supervisors of the county and city of San Francisco an indepen-"dent construction; for the determination of the question whether "the proceedings under these ordinances and in enforcement "of them are in conflict with the constitution and laws of the "United States, necessarily involves the meaning of the ordinances, "which for that purpose we are required to ascertain and ad-"judge."

The court then proceeds to a consideration of the meaning of the ordinances and construes their real meaning to be different from that declared by the supreme court of California. Besides, when a national bank is organized and authorized to do a banking business under the National Bank Act, this act is then in the nature of contract with the bank authorizing it to do that which is thereby authorized. *Dartmouth College* vs. *Woodard*, 4 Wheat.

It seems apparent, then, that it is within the rightful province of this court to determine for itself whether or not sections 1884-1885 of the Code of Iowa (1897) were intended to and do in fact apply to national banks. Do they so apply?

When these sections were enacted many persons and private corporations were doing a banking business in Iowa, though not incorporated as banks under any law of the state, as well as banks so incorporated, and the national banks. This fact was well known to the general assembly of Iowa and it is believed that its purpose in enacting these sections was to make them applicable to such persons and private corporations as were conducting a banking business and the banking corporations unorganized un-

der the state laws, over all of which the state might exercise a supervisory control, and that it was not intended to make them apply to national banks, over which the state could not exercise any such control. It is clear that the other provisions of the Iowa banking law in force when these sections were enacted, and those enacted since they were, do not apply to national banks, their officers, and agents. It will be conceded we think that general words used in a statute should be held to apply only to matters upon which the legislature may rightfully legislate. If the general assembly should enact that no railway company or other common carrier should charge more than a specified rate for the transportation of persons and property and impose a penalty of fine and imprisonment upon any officer or agent of any such company who should do so, it would hardly be contended that such law would apply to interstate transporation, even though congress had passed no law in regard thereto, for such matter is within the exclusive control of congress. When congress enacts a law providing for the establishment of national banks and for their regulation and for supervisory control over them, it then occupies a field of legislation authorized by the constitution of the United States; and the provisions enacted by it for the supervision, control, and regulation of such banks is, and of necessity must be, within the exclusive control of congress under the repeated decisions of this court. Such legislation by congress evinces an intention upon its part that no other shall be applicable thereto. The general words, then, used in sections 1884-1885 of the Iowa code, descriptive of any bank, should be held to apply only to such banks, persons, or corporations doing a banking or deposit business in Iowa, as the state may rightfully regulate or impose the terms or conditions upon which they may do business within the state, and not to national banks over which it can rightfully exercise no such control.

While the supreme court of Iowa says in its decision of this case that it has no doubt that it was intended by the legislature that these sections should apply to national banks, it is not easy to believe that the legislature would undertake to impose a condition or restraint upon the right of a national bank to do business in the state, or to do that which congress has expressly authorized it to do, when it had no power or authority to determine whether the bank was complying with such conditions.

Certainly it will not be claimed that the state could lawfully provide for an examination into the affairs of a national bank, or require reports to be made by its officers or agents to some officer of the state in order that the state might determine whether or not it is insolvent or is conducting its business in accordance with state laws, or to prevent its doing business in the state. So long as the bank is a going concern there is absolutely no way in which the state may determine whether or not it is complying with its laws. Into such a field it is believed the legislature did not intend to enter, and it is apparent, we think, that under the decisions of this and other courts, cited in the other branch of our argument, that congress intended that the state should not enter. Such is the construction placed upon a statute identical with the Iowa law by the supreme court of Kansas; and of similar laws by the supreme courts of Michigan, Pennsylvania and Alabama, in the cases from these states cited in our original brief.

The very fact that the state courts may differ in their judgments as to the applicability of such laws to national banks, and the proper meaning thereof, is an added reason why the subject matter of the regulation or supervisory control and management of the business of such banks should be withdrawn from the operation of state laws; for it is apparent that the purpose of congress in enacting the national bank law was to establish a complete and uniform system for the control of such banks by which alone the officers of the government of the United States charged with their supervision and control should be ~~alone~~ governed. To subject them to the operation of state laws would certainly thwart this purpose. When it is remembered that criminal statutes are inelastic and cannot by construction be made to embrace cases not clearly within their letter and upon which the state may rightly legislate, it would seem that these sections of the Iowa code do not apply to national banks, their officers, or agents.

This question is so closely allied with that of the validity of the Iowa law, if it be held that the construction placed thereon by the supreme court of that state is conclusive upon this court, that much that is said upon that branch of the case may well be considered upon this, and we refer to what we have there said as also applicable in some measure at least to this question.

II.

If the Iowa law applies to national banks, is it valid?

1st. The learned attorney general of Iowa in affirming that it is, does so upon the sole ground, "That when a national bank becomes insolvent it has no legal right to longer continue its business or to receive deposits." In effect, that it must go into liquidation at once. (See his argument at page 29.)

It is believed that this proposition is not sound. Certainly the executive officers of the government charged with the enforcement of the National Bank Act do not so regard it. We have endeavored to show in our argument in chief that the comptroller of the currency is invested under that act with a discretion in regard to permitting a national bank to continue its business though in fact it may be insolvent. That act provides, in addition to the sections of the Revised Statutes already referred to by us in substance, as follows:

Sec. 5191. Whenever the lawful money of any association shall fall below the amount required by law to be kept on hand by it, and it fails to make good such reserve after thirty days notice by the comptroller to do so, the comptroller may, with the concurrence of the secretary of the treasury, appoint a receiver, to wind up the business of the association.

Sec. 5205. If any association shall fail to make good any impairment of its capital stock, caused by losses or otherwise, within three months after notice from the comptroller of the currency to do so, a receiver may be appointed by him to close its business.

Sec. 5228. After default on the part of the association to pay any of its circulating notes has been ascertained by the comptroller of the currency and notice thereof has been given by him to the association, it shall not be lawful for the association to pay out any of its notes, discount any notes or bills of exchange, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it and to deliver special deposits. (This is the only provision of the act that makes it unlawful for the bank to transact the business which it is authorized by law to do, before it is taken possession of by the comptroller of the currency. And this clearly recognizes the lawful right of the bank to continue its business until the comptroller takes action to prevent it.)

Sec. 5239. If the directors of any national bank knowingly violate, or knowingly permit any of its officers or agents to violate any of the provisions of the National Bank Act, all rights, privileges, and franchises of the association shall be forfeited. Such violation, however, shall be declared and adjudged by a proper circuit, district, or territorial court of the United States in a suit brought for that purpose by the comptroller of the currency in his own name, before the association shall be declared dissolved.

The act of June 30, 1876, increases the grounds upon which the comptroller may close the bank and put it in the hands of a receiver. The entire law, however, recognizes the right of the association to lawfully continue to transact the business authorized by it until the comptroller of the currency takes action to prevent it, subject only to such penalties, or liability to forfeiture of its franchises, as are provided by the act itself.

In *National Bank* vs. *Matthews*, 98 U. S., 621, it is held that if a national bank or its officers should transcend any of the powers granted it by the National Bank Act, only the government of the United States can take advantage of this in a direct action to forfeit its franchise; that a third party cannot interfere or take advantage of the forbidden act; that the impending danger of a judgment of ouster and dissolution was the check and none other contemplated by congress. This was a case where the bank had taken title to real estate in violation of the provisions of the National Bank Act. The ruling is followed in *National Bank* vs. *Whitney*, 103 U. S. 99, and *Reynolds* vs. *Bank*, 112 U. S., 404.

That the National Bank Act invests the comptroller of the currency with a discretion as to whether he shall permit a bank organized under its provisions to continue its business, or to close it and put it in process of liquidation seems plain. Such is the construction uniformly placed upon the act by the treasury department; for in times of financial distress that department always rendered all possible aid within its power to relieve the banks from distress or embarrassment so that they may continue their business, rather than to close them under the provisions of the law. This is a contemporaneous construction of the act by the executive department of the government that would be entitled to much weight in determining the proper construction of the law if there was any doubt as to what that construction should be.

Even as we write this paper the daily press informs us that the reports of the national banks in the city of New York to the comptroller of the currency, in response to the recent call of that officer therefor, show the lawful cash reserve of such banks to be far below the legal limit. If called upon to meet their obligations they could not do so, and under the theory of counsel for defendant in error, they must close their doors. In his statement to the banks regarding this reserve, the secretary of the treasury, however, says: "The law lays down the rule that the reserve " shall be maintained, but lodges a discretion with the comptrol- " ler and with the secretary of the treasury as to the enforcement " of the rule. You are therefore notified that the rule will not be " enforced so far as it relates to government deposits secured by " government bonds."

Now, if the state may say that national banks shall not do a part of their business when in a certain condition, it may extend its prohibition to their entire business. It may say that they shall not receive deposits or transact any other business which the law of congress says they may do, when their lawful cash reserve is below a certain limit; it may define insolvency and say that unless the banks shall at all times keep on hand seventy-five per cent (or more) in cash of all their obligations they shall be deemed to be insolvent and shall not only not receive deposits but shall not transact any other business; and under the theory of the attorney general must stop all business. It seems plain that this would be a manifest interference with the right of the banks to transact the business authorized by the law of congress; and with the discretion of the executive officers of the government charged with the supervision and control of their management, to permit them to continue such business, if they shall be so advised from the knowledge of their condition, ascertained by them in the manner required by law; and with the efficiency of the banks in attaining the objects of their creation.

In *Mc Donald* vs. *Chemical National Bank*, 174 U. S., 610, this court recognizes the right of a national bank to continue its business until closed by the comptroller of the currency, as authorized by the National Bank Act. A question arose between the creditors of a national bank as to the validity of its transactions in the ordinary course of its business when it was in fact insolvent, and so known to be by its managing officers, but before the comptroller of the currency had taken

possession of it. Mr. Justice Shiras speaking for the court says: "It is a matter of common knowledge that banks and other cor- "porations continue in many instances to do their regular and "ordinary business for long periods, though in a condition of ac- "tual insolvency as disclosed by subsequent events. * * There "is often the hope that if only the credit of the bank can be kept "up by continuing its ordinary business, and by avoiding any "act of insolvency, affairs may take a favorable turn and thus "suspension of payment and business be avoided. In the pres- "ent instance * * there is no evidence that up to the closing "hours of Jan. 21, 1893, (the day that the bank was closed by "the comptroller of the currency), the Capital National Bank "had failed to pay any depositor on demand, or had not met at "maturity, all its obligations. The evidence fails to disclose any "intention on the part of its officers to presently suspend busi- "ness. * * It may be that those of its officers who knew its "real condition must have dreaded an ultimate catastrophe, * * "but there is nothing to justify the inference that the particular "payments in question were made in contemplation of insolvency. "* * Indeed, it is stipulated that the Capital National Bank "continued to transact its usual and ordinary business up to the "close of banking hours on Jan. 21, 1893."

The holding is in effect that the bank had the legal right to continue its business in the usual manner though actually insolvent and known to be so by its managing officers, until the comptroller of the currency should take possession of its assets and place them in the hands of a receiver.

Counsel for the defendant in error cites certain decisions of this and other courts as supporting his contention; and as a basis for their supposed application to this case says: "In the case at bar the bank had been hopelessly insolvent for years. Its insolvency was known to the plaintiff in error during all of that time; it was tottering to a fall, and yet its doors were kept open, its true condition fraudulently concealed," etc.

The record shows, and the supreme court of Iowa in its opinion, says, "That on August 26th (21), 1896, the First National Bank of Decorah was then open and transacting business in the usual manner, and continued to do so until Nov. 10, 1896, when it was found to be insolvent and put in the hands of a receiver," etc.

It is true that the finding of the jury establishes (in case the

state court has the right to inquire into and determine the question) that the bank was insolvent on August 21, 1896, and that the plaintiff in error then so knew. Stripped of its adjectives this is all that the indictment charges; all that was necessary to be charged under the Iowa law; and all that the verdict of the jury implies. The testimony adduced upon the trial shows that the bank always made the reports of its condition to the comptroller of the currency as required by law, and whenever called upon therefor; that it was examined by the comptroller through his examiners twice a year; that up to the time it was closed on Nov. 10, 1896, it was able to meet and had always met all its obligations as they were presented in the ordinary course of its business, and had never refused to do so. (Transcript of record, pages 17-18). The actual condition of the bank then was made known to the comptroller of the currency during all of this time, and there is an entire absence of evidence tending to show any concealment of its condition from him or any one appointed by him to examine into its affairs or from any one else. Such is the record in this case.

As we read and understand them, the authorities cited by defendant in error hold, in effect, that when a bank is known by its managers to be insolvent, and unable to longer continue its business, but does so continue, and otherwise represents that it is solvent, and thereby induces one on the eve of suspension, who is ignorant of its condition, to make a deposit with it, such facts are sufficient to prevent the title to the deposit from passing to the bank, or constitute such fraud as will entitle the depositor to rescind his contract with the bank and recover from it or its assignee or receiver the deposit or its proceeds whenever he can identify the same. With such decisions we need have no controversy. A review of them will disclose, we think, that they do not meet any question we have in this case.

We said at the outset of our argument in chief that the distinction between the right of a national bank officer to transact its usual and ordinary business as authorized by the law of congress, untrammeled by the criminal laws of the state, and the rights of the bank under a contract made by its officers, must be kept in mind. That it was with the former named question only that we had to deal in this case. It is to the latter named question only that the authorities cited by counsel for the defendant in error apply.

St. Louis & San Francisco Ry. Co. vs. *Johnson*, 133 U. S., 566, is a fair type of the cases cited by the defendant in error. In that case it appears that the railway company had made its sight draft upon its debtor, who resided in Boston, and deposited the draft with the Marine National Bank in New York for collection, and this bank entered the amount of the draft upon its books to the credit of the railway company and forwarded the draft to its correspondent in Boston for collection. Before the draft was collected by its correspondent bank the Marine Bank suspended business and did not again open its doors; in fact it was insolvent and on the eve of closing its doors when the deposit was made with it, and its managing officers so knew. The railway company had been doing business with the bank for a long time, and it was alleged by it that the bank by keeping its doors open, continuing in business, and otherwise, represented to the railway company that it was solvent and thereby induced it to make the deposit of the draft with the bank. Held; that the railway company under such circumstances never parted with its title to the draft or its proceeds and that neither the Marine Bank nor its receiver was entitled to hold the same as against the railway company.

In *Craigie* vs. *Hadley*, 99 N. Y., cited in the above named case, checks were deposited with the bank only a few hours before it suspended; its drafts had been protested the day before; the bank was in a condition of open insolvency, and it was known by its managing officers that it could not longer continue in business. Held, that this constituted such fraud upon the part of its officers in receiving the deposit as would entitle the depositor to rescind his contract with the bank and recover the proceeds of the checks from its assignee or receiver.

In *American Trust and Savings Bank* vs. *Manufacturing Co.*, 150 Ills., 340, the deposit was of a check or draft for collection. The bank suspended before it was collected and payment of the check was stopped by the drawer. Held, that the depositor had a right to do this and that the assignee of the bank was not entitled to the check or its proceeds as against the drawer.

In *Bank* vs. *Strauss*, 66 Miss., 479, (14 Am. St. Rep., 579), deposit was also made of a draft which the receiving bank forwarded to its correspondent, the Meriden Bank, for collection and credit to its account. The receiving bank suspended business before the draft was paid; one of its managers had abscond-

ed before the deposit was made. The drawer stopped payment of the draft and it went to protest. The Meriden Bank claimed the proceeds of the draft as against the drawer to apply on its account with the receiving bank. Held, that it was not entitled to the same as against the drawer of the draft.

It will thus be seen that the sole question decided in each case is, that the depositor of checks or drafts in a bank which is hopelessly insolvent, and which suspends business immediately following the deposit, and before the checks or drafts are collected, prevents the title to the deposit from passing to the bank, or amounts to such fraud as will authorize the depositor to rescind his contract and recover the checks or the proceeds thereof from the receiving bank or its assignee whenever he can identify the same. The rule no doubt would under the same conditions apply to a deposit of money, subject only to the greater difficulty of identifying it. In some of the opinions language is used indicating that it is fraudulent for a bank, in connection with other facts of a fraudulent nature, to continue its business when insolvent; but the ultimate decisions and judgments of the courts must be limited to the issues and facts in each case. This rule has been expressed by this court as follows: "It is trite to say that general "principles announced by courts which are perfectly sound ex- "pressions of the law under the facts of a particular case, may "be wholly inapplicable in another and different case." *Parsons* vs. *District of Columbia*, 170 U. S. at page 51. Under these facts as disclosed by the record in the foregoing cases, the question alone was as to the title or right to the deposit in each case, as between the bank or its assignee or receiver and the depositor. It is plain that no question we have in this case was involved in any of them, and is not decided.

That insolvency alone does not work a dissolution of the bank or other corporation, or prevent it from lawfully continuing its business is a proposition in support of which it is deemed unnecessary to cite authorities. For whether or not a national bank may continue its business when insolvent, or must at once suspend and go into liquidation, is a question that must be determined, as we view it, from the provisions of the law of congress under which it is created. The invariable rule however is, that a bank or other corporation is not prevented from continuing its business in the absence of a statute simply because it is insolvent, but it may continue its business in the usual manner until

it is prevented from doing so by the proper tribunal, and its affairs put in process of liquidation as authorized by the law creating it. And such is the rule under the National Bank Act as held in effect in *McDonald* vs. *Chemical National Bank*, 174 U.S., above.

In *Sutton Manufacturing Co.* vs. *Hutchinson*, 63 Fed. Rep., at page 501, Mr. Justice Harlan speaking for the court of appeals, seventh circuit, says: "A corporation is not required by any duty "it owes to creditors to suspend operation the moment it becomes "financially embarrassed, or because it may be doubtful whether "the objects of its creation can be attained by further effort on "its part. It is in the line of right and duty, when attempting "in good faith by the exercise of its lawful powers, and by the "use of all legitimate means to preserve its active existence, and "thereby accomplish the objects for which it was created." See also *Coler* vs. *Allen*, 114 Federal Rep., 609, (C. C. A., 9th circuit); *American Exchange National Bank* vs. *Ward*, 111 Fed. Rep., 782, (C. C. A , 8th circuit).

In *McClellan* vs. *Chipman*, 164 U. S., 356, cited in behalf of the defendant in error, the insolvent law of Massachusetts was involved. That law provides that any conveyance or transfer of his property by an insolvent debtor with intent to give a preference to any creditor, within six months previous to the filing of a petition to declare him insolvent, is void. A national bank in that state had taken a conveyance of real estate to itself from its insolvent debtor within such six months, with reasonable cause to believe him to be insolvent, and contended that the law of Massachusetts did not apply to such transactions because the National Bank Act authorized it to take a conveyance of property from its debtor to secure an indebtedness to it from such debtor. Held; that such law did not conflict with the law of congress which authorized national banks to take real estate or other security from its debtors; that the law in effect impressed upon the property of insolvent debtors in that state owned by them within such six months a lien in favor of all their creditors, and incapacitated such debtor from displacing such lien by any conveyance or transfer of his property within such time with intent to prefer one creditor over another, that the national bank in taking such conveyance of such property only acquired the same right therein that an individual or other creditor would have acquired under the same circumstances. The law did not attempt to incapacitate the bank from doing any act authorized

by the law of congress, nor did it attempt to impose any condition upon, or restriction of, its right to do so.

The distinction between the law of Massachusetts there construed and the Iowa law under consideration here is plain. The latter operates alone upon the bank and its officers or agents, and declares that to be a crime which the law of congress says they may do. The former operates upon the property of the insolvent debtor in that state, and incapacitates him from giving a preference in or to such property in favor of one creditor over others, and declares that any preferences attempted to be so given shall be void. The determination of a bank's rights to property under such a contract according to the local or other law applicable thereto in no way conflicts with the law of congress authorizing the bank to make such contract. Had the law of Massachusetts undertaken to declare the acts of the officers of the bank in making such contract a crime, or to have prohibited their so doing, it would hardly be contended that such a law did not conflict with the law of congress which authorizes the bank to make such a contract.

The distinction between this law of Massachusetts and that of New York involved in *Davis* vs. *Elmira Savings Bank*, 161 U. S., is very clearly pointed out in the opinion of the court A law of New York declared a preference in favor of savings banks organized under the law of that state over other creditors in the assets of any insolvent bank or trust company there doing businesss. Under this law the Elmira Savings Bank claimed a preference over other creditors in the assets of an insolvent national bank in the hands of a receiver appointed by the comptroller of the currency. This court held in that case that the New York law which declared such preference was repugnant to the law of congress which requires the assets of an insolvent national bank to be ratably distributed among its creditors. The court says: "It is clear these two statutes "cover the same subject matter. Both relate to insolvent na- "tional banks; both ordain that the right of preference on one "side, and the duty of ratable distribution on the other, shall "only result from insolvency. * * It is equally certain that "both relate to the same duty on the part of the officers of the "insolvent national bank. * * To hold that the state statute "is operative is to decide that it overrides the plain text of the "act of congress." This declares the principle that we maintain

is applicable to our case. The law of congress says that the national bank may continue its business, receive deposits and do the other acts authorized by it, subject only to such conditions and restrictions as are prescribed by the act itself. The law of Iowa says it shall not do a part of such business except upon certain other conditions which it seeks to impose, viz., that it must be solvent within the meaning of that term as defined by the Iowa courts. Both of these laws cover the same subject matter, and one or the other of them must yield, for they are in direct conflict.

In *Plumley* vs. *Massachusetts*, a law of Massachusetts also was involved, which prohibits the manufacture or sale within that state of oleomargarine made or colored in imitation of pure yellow butter, and imposes certain penalties for so doing. Plumley was the agent in Massachusetts of citizens in Illinois who were engaged in the manufacture of oleomargarine so made and colored which they shipped to Plumley in the original packages to be sold in Massachusetts; and he was convicted in that state for selling such articles in violation of its law. From such conviction he sought relief upon the ground that the law of Massachusetts was repugnant to the commerce clause of the federal constitution and the act of congress of Aug. 2, 1886, regulating the manufacture and sale of oleomargarine. The majority of this court held the state law to be valid solely upon the ground that it was one to prevent frauds in the manufacture or sale of an article made in imitation of and to represent some other article, whereby consumers were, or might be, deceived into purchasing an article of food which was not in fact what they supposed it to be; that the act of congress referred to was not enacted as a regulation of commerce; and that the question in the case was *unaffected by any act of congress or by any regulation made in pursuance thereof*; that the commerce clause of the federal constitution did not prevent the several states from punishing false pretenses and frauds committed and perpetrated in the sale of property in such state simply because it was shipped there from another state and sold by the shipper in the original package for something other than what it really was. This is the gist of the decision and all thereof. In the course of the opinion Mr. Justice Harlan says: "It (the law of Massachusetts) compels the sale of "oleomargarine for what it really is by preventing its sale for "what it is not. * * Now the real object of coloring oleomargar-

"ine to make it look like butter is to make it appear to be what "it is not, and thus to induce * * purchasers to buy it as and "for butter produced from pure milk and cream." The distinction between the law there construed and one which declares it to be a crime to do only that which a law of congress authorizes, is made clear in the later case of *Schoellenberger* vs. *Pennsylvania*, 171 U. S., 1, referred to at page 29 of our argument in chief.

If the plaintiff in error in this case had made any false statements or representations whatever, or used any trick or artifice of any kind to induce John French to make the contract of August 21st, 1896, and Mr. French was induced thereby to make the same, there might be some reason in saying that plaintiff in error had gone beyond the scope of his authority as authorized by the National Bank act, and for such fraudulent representations he would not be entitled to the protection of the law of congress. See however *In re Waite*, 81 Fed. Rep., above. Stripped of its adjectives nothing of this kind was charged in the indictment against him, nor required to be under the law of Iowa; nor was there any attempt to show it upon the trial; nor could it be shown, for the plaintiff in error had done nothing of the kind. The Iowa statute applies to, and the plaintiff in error stands convicted solely for, an act which he was authorized by the law of congress to perform.

2d. *Has congress covered the field of legislation entered by the Iowa law?*

It is next said that congress has not covered this field of legislation because it has not made the receipt of deposits by a national bank a crime; therefore it is competent for the state to do so. The fallacy of this argument is in the assumption that congress has not covered this field of legislation.

We have endeavored to show that inasmuch as congress has provided for the establishment of a national bank it has exercised a power granted to it exclusively under the federal constitution and that the law enacted by it evinces its intention that there shall be no other law to act upon such subject matter, and especially upon the right of the bank to transact the business authorized by congress. The authorities cited by us clearly establish this rule.

In *Leisy* vs. *Hardin*, 135, U. S., so cited, Mr. Chief Justice Fuller speaking for a majority of the court says: "Where the

"subject matter requires a uniform system as between the states, "the power controlling it is necessarily exclusive in congress and "cannot be encroached upon by the states. * * It is easy to "see that congress may assert an authority under one of the "granted powers, which would exclude the exercise by the states "upon the same subject of a different but similar power, between "which and that possessed by the general government no inher- "ent repugnancy existed. Whenever, however, a particular "power of the general government is one which must necessar- "ily be exercised by it, and congress remains silent, this is not "only not a concession that the powers reserved by the states "may be exerted as if the specific power had not been elsewhere "reposed, but on the contrary, the only legitimate conclusion is, "that the general government intended that that power should "not be affirmatively exercised; and the action of the states can- "not be permitted to effect that which would be incompatible "with that intention."

That the power to establish a national bank belongs exclusively to congress cannot be gainsaid at this date. That such banks should be, and were intended by congress to be, governed by a law of uniform operation so far as the exercise of the authority granted to them and the management, regulation and control of their business by the general government is concerned, cannot be doubted. This being so, it must follow that the states cannot be permitted to interfere with the bank in the exercise of such powers, nor with the general government in the supervision and control of their management. The legislation of congress upon such matters precludes any by the states thereon.

3d. *The same act may be an offence against both the state and the United States.*

Cross vs. *North Carolina*, 132 U. S., 139, is cited by the defendant in error in support of this proposition. In this case an indictment in two counts was found in the proper state court against Cross, charging him with the forging of a certain promissory note payable to and at a national bank, and of certain endorsements upon said note, with intent to defraud, in violation of the statute of North Carolina. Also with forging such note and endorsements with intent to defraud a national bank. The defendant filed a plea in abatement in which it was alleged that the for-

gery was committed for the purpose of being used in making certain false and fraudulent entries upon the books of a national bank with intent to deceive the national bank examiners in making an examination of said bank, in violation of section 5209 of the revised statutes of the United States. The plea was overruled. A *nolle prosequi* was then entered upon the counts of the indictment charging the intent to defraud the national bank examiners. Upon a trial Cross was found guilty of forgery. Held; that there was no error in overruling the plea in abatement; nor in his conviction of the crime of forgery under the statute of North Carolina; that a crime against the state could not be obliterated or excused by committing or attempting to commit another and distinct crime against the United States. In the course of its opinion the court refers, *arguendo*, to the rule that the same act or series of acts may be an offense against the state and also against the United States. The inapplicability of this principle to any question we have in this case seems apparent, for the United States has not made the acts charged against the plaintiff in error in this case a crime, but has expressly authorized such act. The other cases cited upon this point need not be further considered, for it is believed the principle has no application to our case.

People vs. *Fonda*, 62 Mich.; *State* vs. *Mencke*, 56 Kas.; and *Commonwealth* vs. *Ketner*, 92 Pa. St., are apparently conceded to be against the contention of the counsel for defendant in error; but it is intimated that the first of these cases is erroneously decided, and said that the Ketner case appears to have been overruled by the later case of *Commonwealth* vs. *Luberg*, 94 Pa. St., 85. As to the criticism of the Michigan case we can make no reply. As to *Commonwealth* vs. *Ketner*, counsel is in error in supposing it to be overruled by the Luberg case. It is referred to in that case as *Commonwealth* vs. *Torrey*, the correct title being *Commonwealth ex rel. Torrey* vs. *Ketner*; and also in *Allen* vs. *Carter*, 119 Pa. St., 192, and approved in both cases.

Commonwealth vs. *Tenney*, 97 Mass., 50, was not the case of the embezzelment of the property of the bank, as stated by counsel. The property was that of one Purple, deposited by him with the bank as a special deposit, and remained his property. It was stolen by a clerk in the bank and converted to his own use. It is apparent the case is not in conflict with any we have cited.

State vs. *Bardwell*, 72 Miss., 535, is also cited. This case

stands alone upon the question we are considering, and its value as a precedent may well be questioned. There was an attempt to indict the defendant, a cashier of a national bank, under a statute of Mississippi prohibiting the acceptance of a deposit by any bank when it was insolvent. A demurrer to the indictment, based upon several grounds, was interposed and was sustained, but upon which ground does hot appear. On appeal by the state it was held by the supreme court that the indictment was insufficient to charge any offense under the statute, even though defendant had not been an officer of a national bank. This, it would seem, was an end of the controversy, for if the indictment failed to allege any facts constituting an offense there was nothing further to be considered. After so disposing of the case, however, the opinion proceeds to consider the question as to whether or not a national bank officer might be amenable to the state statute if the indictment had been sufficient to charge an offence thereunder. Upon this point the opinion of the court seems to be *dictum* only. The opinion makes no reference to any federal decision except the counterfeit cases, but at the close it apparently recognizes the rule that as to matters within the power of congress to legislate upon, if congress does so legislate, this excludes any legislation by the state upon the same subject matter.

It is said that the cases cited by us are inapplicable, and that in *Cunningham* vs. *Neagle*; *Ohio* vs. *Thomas*; and *In re Waite* the parties proceeded against were officers of the United States, and each charged with the performance of a particular duty under its laws, and that the acts charged against them were done in the performance of such duties. We think counsel misapprehends the grounds of the decisions and the principles declared in these cases. It is true that Neagle was in the performance of a duty specially enjoined upon him by the orders of a United States marshal. The grounds of the decision, however, are that he was acting in pursuance of an authority or law of the United States. But neither Thomas nor Waite was charged by any law or executive order with doing the acts which were charged against them respectively as being in violation of the state law. In the *Thomas* case it is held that it may be conceded that the act done by him was not necessary for the discharge of any duty enjoined upon him in the management of the affairs of the soldiers' home; and in the *Waite* case it was found by the state court that the act done by him

was outside of any duty enjoined upon him by any law of the United States or order of the pension bureau, and the opinion of the United States court proceeds upon the theory that if Waite had in fact overstepped his duties as an agent of the United States, the general government alone could call him to account therefor. It is apparent that the ground of the decision in each of these cases is that the acts charged against the defendants therein were acts authorized by a law of congress, and that therefore it was beyond the power of the state to declare such acts to be crimes against its laws.

There was no law of the United States, however, charging McCulloch with the duty of not using the stamped paper of Maryland in issuing the notes of his bank; nor Brown with the duty of importing his package of goods from a foreign country and selling the same; nor Prigg with the duty of seizing the person of Margaret Morgan and taking her back to Maryland; nor Leisy & Co., or Rhodes with the duty of bringing intoxicating liquors into the state of Iowa from some other state. In each of these cases the person simply exercised a right authorized by the constitution or some law of the United States.

In the strict sense, an officer of a national bank may not be an officer of the United States; but the bank is an instrumentality or agency of the United States, and he as an officer of such bank may lawfully do whatever the bank is authorized to do by the law creating it.

III.

Is the Iowa law a valid exercise of the police power of the state?

If it in fact impinges upon a law of congress it is of course void, no matter under what power of the state it is claimed to have been enacted.

In *Lawton* vs. *State*, 152 U. S., 133, Mr. Justice Brown speaking for a majority of the court says: "It (the police power) is "universally conceded to include everything essential to the pub- "lic safety, health, and morals, and to justify the destruction or "abatement by summary proceedings of whatever may be re- "garded as a public nuisance. * * To justify the state in thus "interposing its authority in behalf of the public it must appear; "First, that the interest of the public generally, as distinguished "from a particular class, requires such interference; and, Second,

" that the means are reasonably necessary for the accomplish-
" ment of this purpose, and not unduly oppressive upon individu-
" als. The legislature may not under the guise of protecting the
" public interest arbitrarily interfere with private business, or
" impose unusual or unnecessary restrictions upon lawful occupa-
" tions." After citing instances in which it was held that the acts of the state were invalid under this rule, he says: "In all " these cases the acts were held to be invalid as involving an un-" necessary invasion of private rights and a practical inhibition " of certain occupations, harmless in themselves, and which " might be carried on without detriment to the public interest."

In *Barbier* vs. *Connolly*, 113 U. S., 27, an ordinance of the city and county of San Francisco prohibiting laundry work within certain prescribed territory of a large city between 10 o'clock p. m. and 6 o'clock a. m., was upheld as a valid exercise of the police power in that it was a reasonable regulation for the protection of property against fire in a thickly settled portion of the city composed largely of wooden buildings. The prohibition extended to all persons conducting such business and not to any particular class so conducting it. In other words, it forbade the doing of such work by any one during such hours. Mr. Justice Field in speaking for the court says: "The fourteenth amend-" ment in declaring that no state * * shall deny to any person " within its jurisdiction the equal protection of the laws undoubt-" edly intended * * that no impediment should be imposed " on the pursuits of any one, except as apply to the same pur-" suits by all others under like circumstances and that no greater " burden should be laid upon one than are laid upon others in the " same calling and condition. * * "

It is true that the state may classify certain kinds of business for the purpose of regulating or controlling it; but it is equally true that such classification cannot be made arbitrarily and without reference to the effect upon the public of the acts or business so classified.

In *Gulf, etc. Ry. Co.* vs. *Ellis*, 165 U. S., Mr. Justice Brewer says: "That such classification must always rest upon some dif-" ference which bears a just relation to the act in respect of which " the classification is proposed, and can never be made arbitrar-" ily and without any such basis."

In *Cooley's Constitutional Limitations*, page *577, speaking of the regulation of corporations it is said: "The limit of the exer-

" cise of this power must be this; the regulations must have refer-
" ence to the comfort, safety and welfare of society. They must
" not be in conflict with any of the provisions of the charter, and
" they must not under the pretense of regulation take from the
" corporation any of the essential rights and privileges which the
" charter confers. In short, they must be police regulations in
" fact and not amendments to the charter in curtailment of the
" corporate franchise."

The classification, then, which the state may lawfully make must be of the business actually transacted and must be based upon some reasonable relation which such business bears to, or effect which it has upon, the public at large, and cannot be arbitrarily made upon the calling or occupation of the individual without reference to the business actually transacted. Thus it would not do to impose a license or penalty upon a surgeon for incurring an indebtedness for the purchase of necessary books or instruments of his profession while all others of the community are exempt from such penalty for incurring an indebtedness in their business. This would be arbitrary selection for the purpose of invidious and unjust discrimination against the surgeon.

The business of a bank consists in part in receiving deposits and repaying them on demand; also in lending money and buying and selling exchange and discounting notes and other commercial paper, and unless prevented by its charter it may lawfully borrow money to be paid by it at a fixed time in the future, with interest or other valid consideration. If it were conceded that the receipt of deposits by a bank, as that term is ordinarily understood, and its obligations to repay them on demand, was of such nature in its relation to, and effect upon the public at large as to furnish a basis for legitimate classification by the state for the purpose of regulating that particular branch of the business, certainly there is no more reason for denying to a bank the right to make a contract, even though it be insolvent, to borrow money to be paid at a fixed time in the future, than there is in denying such right to a mercantile or other trading corporation, or individual. The right to make such a contract is a ~~natural and common~~ legitimate one, not granted by any statute of the state, ~~not in derogation of~~ recognized by the common law, and when exercised without any fraudulent representations or practices is not injurious to any public interest nor to the peace or welfare of the community, and not within the proper scope of police regulation. *Allgeyer* vs.

State vs. Seneyd, 57 Minn 358 (S. Ct.)

Louisiana, 165 U. S., 578. Such right is of the highest value to the debtor in all classes of business, and by the exercise of it he is often saved from permanent embarrassment and financial ruin to himself and perhaps others.

The bank or banker is no exception to this rule. The fact that in the case of the bank it evidences such a contract in the form of a certificate of deposit payable at a fixed time in the future, bearing the rate of interest agreed upon with the lender, which is in effect a promissory note, does not change the nature of the contract nor the liability of the bank; it is still one for the borrowing of money to be paid at the time agreed upon and nothing else. To hold that it was not would be giving effect to the form and not to the substance of the contract.

The transaction between the plaintiff in error on behalf of the First National Bank of Decorah and John French is of the latter named character, and by the expressed terms of the contract it is not to be paid until the expiration of the term for which the money was borrowed, namely, six months, and not upon the check of Mr. French.

When not defined by statute the term "insolvency" ordinarily means "insufficiency of one's assets to pay his obligations." In bankruptcy laws and decisions it is often used in a more restricted sense, and is defined or held to mean "inability to meet one's obligations as they become due in the ordinary course of business. *Toof* vs. *Martin*, 13 Wall., at page 47. In the present bankruptcy law it is given its ordinary meaning. The Iowa law under consideration does not define it nor say what shall be evidence of it; but the supreme court of that state holds that it is there used in the restricted sense above mentioned. Under such construction thereof, if the assets of a bank, upon a fair valuation, should be double its obligations, or ample to pay them in full upon the winding up of its affairs, but because of temporary conditions it is unable to turn them so as to meet its obligations as they become due in the usual course of business, it is insolvent, and the bank must stop business; for if it declines to receive deposits it proclaims its embarrassment, which would surely result in closing it. If any officer who knows its condition should accept a deposit he incurs at once the penalty imposed by that law, even though he may in good faith believe that the bank will be able to pay the obligation in full at its maturity, and though it in fact may be so paid, or upon a final distribution of the bank's

assets. Under such circumstances the person accepting the deposit might be convicted of a felony, though the depositor or creditor in fact was not defrauded and suffered no loss or injury whatever.

In *Fuzz* vs. *Spaunhorst*, 67 Mo., 256, the supreme court of Missouri in speaking of the constitution of that state, which declared it to be a crime for a bank to receive deposits or create debts when insolvent, says: "It is a matter of common informa-" tion that there is a tide in the affairs of banks as well as of men; " that financial crises occur when ample assets become for the " time being comparatively valueless, when but for timely as-" sistance institutions of the most undoubted actual solvency " must succumb to the existing pecuniary pressure. It is obvious " if assistance be absolutely necessary even for a brief period of " time, that the bank requiring it cannot justly claim to be en-" tirely solvent at the moment when assistance is needed. It is " equally obvious that a deposit made with, or loan to, the bank " under the circumstances above stated, though made with full " knowledge by the depositor or creditor, and with the express " purpose of aiding the bank so as to prevent failure and conse-" quent loss * * would subject every officer assenting to such " loan or deposit though done with the best of motives, to indi-" vidual responsibility." This aptly describes the effect of the Iowa law in its practical operation. It is not one to define and punish actual frauds or false pretenses in the obtaining of property or incurring of indebtedness applicable alike to all persons in the community; but is one that arbitrarily selects persons conducting a banking business and prevents them from incurring an indebtedness though no fraud is practiced or fraudulent representations whatever made by them in doing so, while all others of the community may lawfully incur such indebtedness, though in the same condition as to insolvency as the bank, or even worse. It arbitrarily declares it to be a crime for a bank or its officers to incur an indebtedness to be paid in the future, solely because it is a bank and conducts a banking business, if it afterwards transpires that when such debt was contracted the bank was "unable to meet its obligations as they became due in the usual course of business." As so construed by the supreme court of Iowa and applied to a contract like that between the First National Bank of Decorah and John French shown by this record, it is believed that such law is within the inhibitions of the fourteenth amendment to the federal constitution and void.

Respectfully submitted,

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for Plaintiff in Error.

ADDENDA.

The principle contended for in the second division of our arguments is further illustrated in *Railroad Co.* vs. *Peniston*, 18 Wall., 5, cited by the defendant in error; and in *California* vs. *Railroad Co.*, 127 U. S., 1.

In *Railroad Co.* vs. *Peniston*, a majority of this court held that the physical property of the Union Pacific Railroad Co., a corporation organized under the laws of the United States, was subject to taxation by the state in which such property was located; but,

In *California* vs. *Central Pacific Railroad Co.*, it is held that the franchises of a corporation organized under a law of congress, that is, the right to exercise the powers and privileges granted by the law of congress, are not subject to taxation or to be interfered with in any manner by the state. The court says: "It "seems very clear that the state of California cannot take them "(the franchises) away, nor destroy, nor abridge them, nor "cripple them by onerous burdens. * * It may undoubtedly "tax outside visible property of the company in the state. That "is a very different thing. But may it tax franchises which are "a grant of the United States? In our judgment it cannot. "What is a franchise? Blackstone defines it as 'a royal privilege "or branch of the king's prerogative subsisting in the hands of "the subject.' * * It is a right, privilege, or power of public "concern which ought not to be exercised by private individuals "at their mere will and pleasure, but should be reserved for pub-"lic control and administration, either by the government di-"rectly or by the government agents acting under such condi-"tions and regulations as the government may impose in the "public interest and for public security. Such rights and pow-"ers must exist in every form of society. * * No persons can "make themselves a body corporate without legislative author-"ity. *Corporate capacity is a franchise.* * * In view of this "description of the nature of a franchise, how can it be possible "that a franchise granted by congress can be subject to taxa-

" tion by a state without the consent of congress? * * Recol-
" lecting the fundamental principle that the constitution, laws,
" and treaties of the United States are the supreme law of the
" land, it seems to us almost absurd to contend that a power
" given to a person or corporation by the United States may be
" subject to taxation by a state."

The franchise possessed by the Central Pacific Railroad Co. which is so held to be beyond the power of the state to tax or otherwise interfere with was the right to construct, equip, own, and operate a line of railway in and through the state of California and other states and territories of the United States. Such right might be exercised by an individual or corporation under the authority of a law of a state. But congress deeming it expedient that a railroad and telegraph line should be constructed from the Missouri river to the Pacific ocean, which might be used by the general government for postal, military and other purposes, authorized the incorporation of a company for this purpose, in pursuance of which the Central Pacific Railroad Co. was clothed with the powers and privileges which were deemed necessary to enable it to construct, equip, own, and successfully operate such a line. The powers so conferred upon such company are held to be franchises granted by the United States, and not subject to taxation or burdens of any kind imposed by state authority.

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